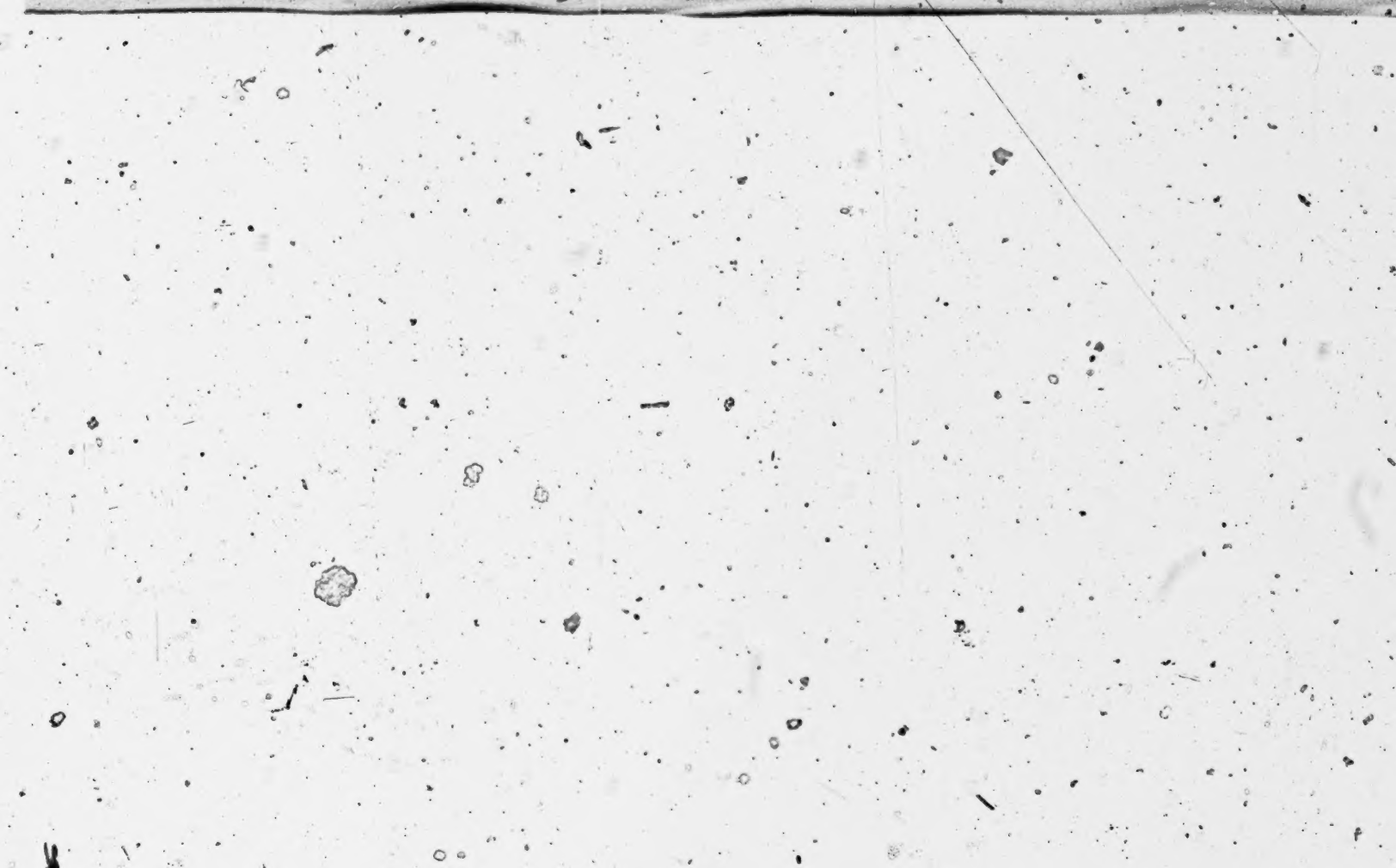

NO. 19

In the Supreme Court of the United States

October Term, 1939

OKLAHOMA PACKING COMPANY, Formerly Wilson & Co., Inc., of Oklahoma, an Oklahoma Corporation, and WILSON & CO., INC., OF OKLAHOMA, a Delaware Corporation,

Petitioners,

VERSUS

OKLAHOMA GAS & ELECTRIC COMPANY, a Corporation; OKLAHOMA NATURAL GAS COMPANY, a Corporation; W. T. PHILLIPS, JR., H. J. CRAWFORD, J. V. RITTS, LEONARD C. RITTS, R. W. HANNAN, A. W. LEONARD, and R. C. SHARP, the Directors of Oklahoma Natural Gas Company, a Dissolved Corporation; and OKLAHOMA NATURAL GAS CORPORATION,

Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit

BRIEF FOR RESPONDENTS

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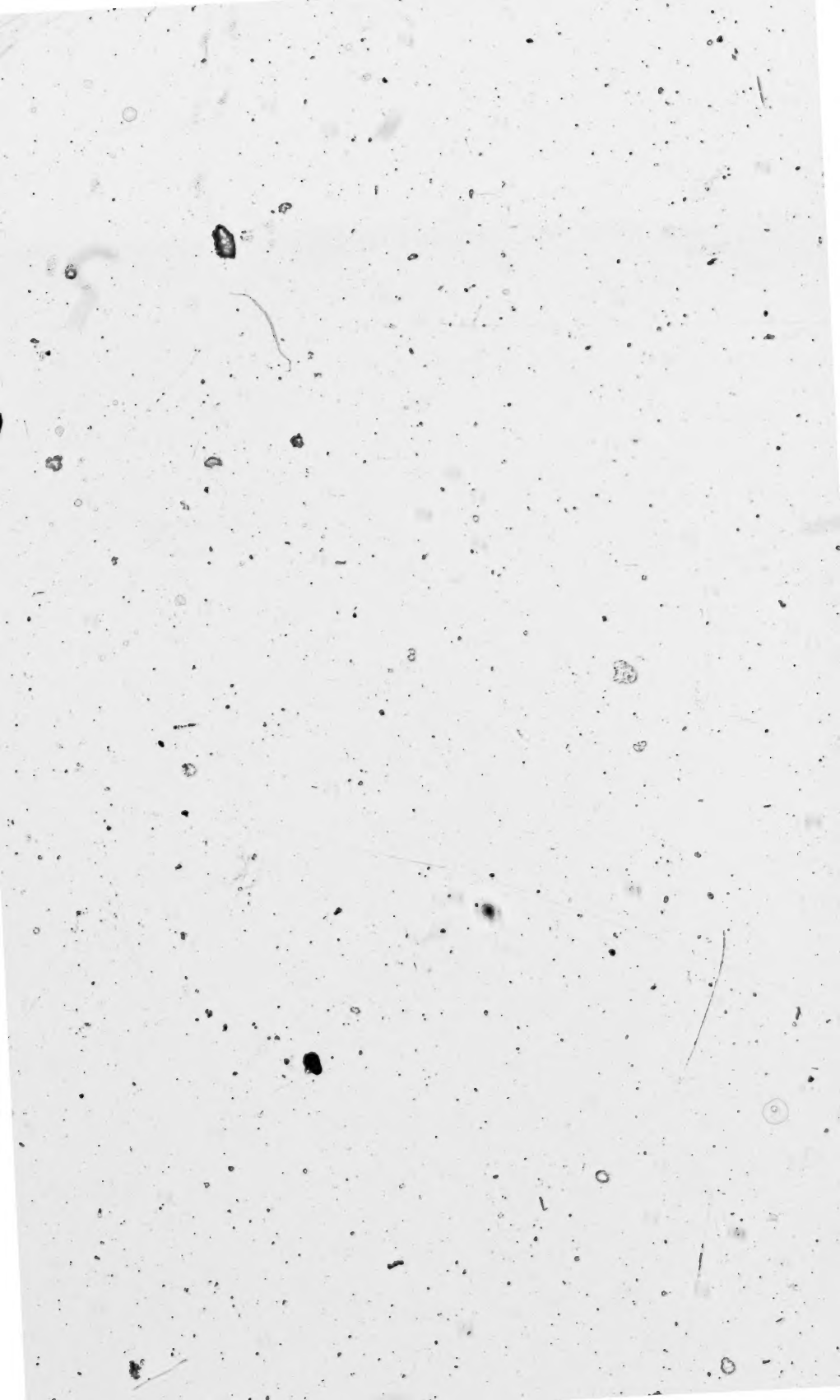

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TABLE OF CASES

CONSTITUTION AND STATUTES CITED

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BRIEF FOR RESPONDENTS

STATEMENT

On the 15th of November, 1925, Wilson & Company, Inc., of Oklahoma, an Oklahoma corporation, with a meat packing plant outside the city limits of Oklahoma City, filed a complaint against Oklahoma Gas & Electric Company and Oklahoma Natural Gas Company with the Corporation Commission of the State of Oklahoma, asking that the Oklahoma Natural Gas Company be compelled to furnish it

with gas service, and that "* * * the Commission make such order with reference to the price of gas to be charged this plaintiff, the connection and meters to be installed, the supply lines to be laid, and the costs thereof * * * " (T. 15). At all times prior to the filing of the Complaint, such gas service as Wilson & Company, Inc., of Oklahoma (Oklahoma) had availed itself of had been furnished by the Oklahoma Gas and Electric Company, the holder of a gas franchise in Oklahoma City, and the operator of a gas distribution system in Oklahoma City and its environs.

The Corporation Commission on the 13th day of April, 1926 (T. 16-25), filed its findings, opinion and order, directing that the Oklahoma Natural Gas Company furnish service to Wilson & Company, Inc., at the rates prescribed therein. An appeal was prosecuted to the Supreme Court of the State, which affirmed the Corporation Commission's order (*Oklahoma Gas & Electric Company* v. *Wilson & Company, Inc.*, 146 Okla. 272). Suit was then filed in the United States District Court for the Western District of Oklahoma by respondents herein against Wilson & Company, Inc., an Oklahoma corporation, and the Corporation Commission, in which the validity of the order was assailed on federal grounds and an injunction sought.

The District Court sustained a motion to dismiss on the ground that the affirmance of the order by the Supreme Court of the State was judicial in character, as distinguished from legislative. An appeal was prosecuted to the Circuit Court of Appeals for the Tenth Circuit, which reversed the District Court, stating:

"It is also clear from the State Constitution that in

affirming the order the Supreme Court acted only in the exercise of a legislative function." (*Oklahoma Gas and Electric Co. et al. v. Wilson & Company, Inc., of Okla. et al.*, 54 Fed. (2d) 596.)

The opinion in the above case was filed on December 21, 1931, and became final. On the 3rd of December, 1931 (T. 26), Wilson & Company, Inc., of Oklahoma (Oklahoma) transferred its meat packing plant at Oklahoma City, together with all choses in action and claims, including the one in controversy herein, to Wilson & Company, Inc., of Oklahoma, a Delaware corporation, which immediately thereafter filed an action in the state District Court of Oklahoma County, Oklahoma, to recover an amount of money collected by the Oklahoma Gas and Electric Company from Wilson & Company, Inc., in excess of the amount that would have been collected under the rate prescribed in order No. 3388 of the Corporation Commission, a part of which excess was covered by the supersedeas bonds given by Oklahoma Gas and Electric Company upon the taking of the appeal to the Supreme Court of the State of Oklahoma from the order of the Corporation Commission (T. 26, 44). For reasons unnecessary to mention (T. 59), this suit in the United States District Court was dismissed on May 18, 1932, and refiled on May 20, 1932 (T. 97). The Delaware corporation was joined therein as a defendant. A three-judge court convened pursuant to Section 266 of the Judicial Code, dismissed the cause on the ground that the invalidity of the order of the Commission could be pleaded as a defense in the action filed by Wilson & Company, Inc., of Oklahoma (Delaware) in the state District Court and

that complainants therefore had an adequate remedy at law in the state court (T. 75, 81). An appeal was prosecuted from such dismissal to this court (*Oklahoma Gas & Electric Co. et al.* v. *Oklahoma Packing Co. et al.*, 292 U. S. 386), which reversed the District Court, holding that the suit did not fall within Section 266 of the Judicial Code and that the appeal had mistakenly been taken to this Court.

After remand, the case was tried by the United States District Court for the Western District of Oklahoma before one judge, and resulted in a judgment holding the order of the Corporation Commission invalid, enjoining Wilson & Co., Inc., of Okla. (Delaware) from prosecuting its action in the state court and denying an injunction against the Corporation Commission, but without prejudice to further action by respondents here, should the Commission threaten or endeavor to enforce such order. Findings of fact and conclusions of law were made (T. 86) and an opinion filed (T. 97). An appeal was prosecuted by petitioners herein, but not by the Corporation Commission or any of its members, to the United States Circuit Court of Appeals for the Tenth Circuit, which affirmed the District Court. *Oklahoma Packing Company et al.* v. *Oklahoma Gas & Electric Company et al.*, 100 Fed. (2d) 770 This Court, on April 17, 1939, granted certiorari (T. 213).

Shortly prior to the decision in this case by the United States District Court the Supreme Court of Oklahoma reversed the state district court, which had rendered judgment in favor of Wilson & Co., Inc., of Oklahoma (Delaware). *Oklahoma Gas & Electric Co.* v. *Wilson & Co.*, 178

Okla. 604. The Supreme Court therein stayed all further proceedings in the State District Court until the validity of the Corporation Commission's order is finally determined in this action.

ANSWER TO PETITIONERS' PROPOSITION I.

(Petitioners' Brief, page 10)

Petitioners contend that the Supreme Court of the state, in affirming the order of the Corporation Commission (*Oklahoma Gas & Electric Co. v. Wilson & Co., Inc.*, 146 Okla. 272, 288 Pac. 316), acted in its judicial as distinguished from its legislative capacity and, that, its decision is *res adjudicata* of the issues in the present suit (Petitioners' Brief, p. 10).

The Circuit Court of Appeals, in *Oklahoma Gas & Electric Company* v. *Wilson & Co.*, 54 Fed. (2d) 596, held that the Supreme Court of the state in affirming the Commission's order acted legislatively. This decision is *res judicata* as to the parties here. (Compare *Oklahoma Natural Gas Co. v. Russell*, 261 U. S. 290, 291). That opinion was cited by the Supreme Court of the state in *City of Poteau v. American Indian Oil & Gas Co. et al.*, 159 Okla. 240, 242, 243, and the case of *Oklahoma Gas & Electric Co.* v. *Wilson & Co.*, 146 Okla. 272, 288 Pac. 316, is also referred to therein.

In *McAlester Gas & Coke Co.* v. *Corporation Commission et al.*, 101 Okla. 268, 270, the state court specifically approved the procedure followed herein to obtain a judicial review of the Commission's order.

On the 17th of October, 1936, in *Oklahoma Cotton Ginners Ass'n et al.* v. *State et al.*, 174 Okla. 243, the Supreme Court of the state held that its review of orders similar to that involved herein was judicial. An interesting discussion of some of the cases in which it had held to the contrary will be found on page 251, where reference is also made to the cases of *Oklahoma Gas & Electric Co.* v. *Wilson & Co.*, 54 Fed. (2d) 596, and *Oklahoma Natural Gas Co.* v. *Russell*, 261 U. S. 290.

The order of the Corporation Commission herein was entered on the 13th of April, 1926. The opinion on appeal was filed by the Supreme Court of the state on April 29, 1930 (*Oklahoma Gas & Electric Co. et al.* v. *Wilson & Co. et al.*, 146 Okla. 272), and respondents here could not anticipate in 1930 that the Supreme Court of the state in 1935 would change its position in regard to the capacity in which it reviewed a certain class of orders appealed from the Corporation Commission.

A situation very similar to that presented herein was before this Court in *Corporation Commission of Oklahoma et al.* v. *Cary, Trustee*, 296 U. S. 452. The Supreme Court of Oklahoma, in *Oklahoma Gas & Electric Co.* v. *Wilson & Co.*, 178 Okla. 604, opinion filed September 15, 1936, in reversing the District Court of Oklahoma County and directing that all further proceedings by Wilson & Company to enforce the order be stayed pending final determination of the instant suit, said:

> "In the instant case, in view of the fact that defendants' right to a judicial remedy in the state courts was uncertain, the Federal Court acquired jurisdiction of

the cause instituted therein by defendants. That remedy was available to them as the only certain method of obtaining a judicial determination of the validity of the Commission's order. *The suit was a direct attack upon such order, and until its validity was established in that suit the state court was without jurisdiction to proceed with an action based upon such order. This for the reason that where direct attack in equity is made upon the order of the Commission the defendant's liability on such order is not finally determined judicially until final determination of the equitable action.* See *Pioneer Tel. & Tel. Co. v. State*, 40 Okla. 417, 138 Pac. 1033." (Italics ours.)

It is well settled that what effect a judgment of a state court shall have as *res judicata* is a question of State law. *Union & Planters Bank* v. *Memphis*, 189 U. S. 71, 75; *Nev-Cal Electric Securities Co. v. Imperial Irr. Dist. et al.*, 85 Fed. (2d) 886, 898.

ANSWER TO PETITIONERS' PROPOSITION II.

(Petitioners' Brief, page 13)

It is contended that under Section 265 of the Judicial Code the lower court erred in enjoining petitioners from endeavoring to enforce the order of the Corporation Commission by means of the suit in the District Court of Oklahoma County. Respondents, in their petition herein (T. 8, 9 and 10), allege that the action filed in the District Court of Oklahoma County was commenced and is being prosecuted for the purpose of harassing and annoying them. The Supreme Court of the state, in *Oklahoma Gas & Electric*

Company et al. v. *Wilson & Company, Inc.*, 178 Okla 604, 606, has held that the District Court of Oklahoma County was without jurisdiction to proceed with that action until the final determination of the validity of the Corporation Commission's order in *this equitable action.* The situation is very similar to that presented in *Madisonville Traction Co.* v. *St. Bernard Mining Co.*, 196 U. S. 239, 244, 246.

It is contended by petitioners that the case of *Steelman* v. *All Continent Co.*, 301 U. S. 278, 290, 291, cited by the Circuit Court of Appeals in its opinion, "is not applicable for the reason that it involved a proceeding in bankruptcy, which is specifically excepted in Section 265, and, further, that section was not under consideration." (Petitioners' Brief, pp. 15-16.) The appellant in the Steelman case was not seeking an injunction authorized by any law relating to proceedings in bankruptcy, and the cases cited in the opinion are not bankruptcy cases, several specifically referring to Section 265 of the Judicial Code.

ANSWER TO PETITIONERS' PROPOSITION III.

(Petitioners' Brief, page 16)

VENUE

On the question of venue the trial court found (T. 95):

"Prior to the commencement of this action Wilson & Company, Inc., of Oklahoma, a Delaware corporation, qualified, as provided under the statutes of the State of Oklahoma, to do a local business as a foreign corporation in the State of Oklahoma and at the time of and prior to such institution of this action was so doing a local

business in Oklahoma County, Oklahoma. In connection with such qualification and as provided by the statutes of the State of Oklahoma said foreign corporation duly executed in writing and filed with the proper officers of the State of Oklahoma an appointment of an agent upon whom service of process might be had in any action in the State of Oklahoma to which said company may be a party and consenting that such service should be due and legal service on the company and that all actions against it might be brought in the county in which the cause of action arose."

As stated by the Circuit Court of Appeals in its opinion such finding was not excepted to or otherwise challenged in the trial court (T. 206).

Moreover, it is well settled that a corporation cannot do a local business in a state other than that of its incorporation without the consent of such state. The consent can be arbitrarily refused, or reasonable conditions may be attached thereto.

Bank of Augusta v. *Earle*, 13 Peters, 519, 584, 487.

Paul v. *Virginia*, 8 Wall. 168, 181.

Horn Silver Mining Co. v. *New York*, 143 U. S. 305, 315.

Hemphill v. *Orloff*, 277 U. S. 537, 548.

Fidelity & Deposit Co. v. *Tafoya et al.*, 270 U. S. 426, 434.

Hanover Ins. Co. v. *Harding*, 272 U. S. 494, 507.

Washington et al. v. *Superior Court, etc., et al.*, 289 U. S. 361, 364, 365.

Atlantic Refining Co. v. *Virginia*, 302 U. S. 22, 26.

The condition imposed by Oklahoma on foreign corporations for transacting local business within the state, that they agree to be sued in the county in which the cause of action arose, was reasonable. *Ex Parte Schollenberger*, 96 U. S. 369. See also *Lafayette Ins. Co.* v. *French*, 18 How. 404; *Railroad Co.* v. *Harris*, 12 Wall. 65; *Conn. Mutual Life Ins. Co.* v. *Spratley*, 172 U. S. 602, 613, 614.

The condition in the instant case did not require the surrender of any constitutional right. *Hanover Fire Ins. Co.* v. *Harding*, 272 U. S. 494, 507; *Terral* v. *Burke Construction Co.*, 257 U. S. 529, 532; *Frost Trucking Co.* v. *R. R. Com.*, 271 U. S. 583; *Power Mfg. Co.* v. *Saunders*, 274 U. S. 490, 496, 497; and compare *Atlantic Refining Co.* v. *Virginia*, 302 U. S. 22; *Washington* v. *Superior Court*, 289 U. S. 361, 365.

The venue statute, Section 51 of the Judicial Code, 28 U. S. C. A. 112, does not limit the jurisdiction of the District Courts. In the instant case the United States District Court for the Western District of Oklahoma had jurisdiction, since the suit arose under the Constitution of the United States. The venue statute, as distinguished from the statute defining the jurisdiction of District Courts, confers a personal privilege, which may be waived in various ways, express or implied. *Ex parte Schollenberger*, 96 U. S. 369, 378; *In re: Moore*, 209 U. S. 490; *Western Loan & Savings Co.* v. *Butte Mining Co.*, 210 U. S. 368; *Lee* v. *C. & O. Railway Co.*, 260 U. S. 653, 655; *Peoria & Pekin Union Ry. Co.* v. *United States et al.*, 263 U. S. 528, 536; *Commercial Casualty Co.* v. *Consolidated Stone Co.*, 278 U.

S. 177, 179; *Seaboard Rice Milling Co.* v. *C., R. I. & P. Ry. Co.*, 270 U. S. 363, 367.

The consent of a foreign corporation, desiring to do a local business in Oklahoma, to suit in the local courts is not an unreasonable requirement. Its purpose is apparent, and we believe salutary. A citizen of Oklahoma should not be compelled on a cause of action arising in Oklahoma against a foreign corporation, which he desires to bring in the federal court, to go back to the state where the corporation was chartered, to Delaware in this instance. This would seem especially true since the foreign corporation, if sued in a state court, jurisdictional elements being present, could remove the case to a federal court. The consent to be sued herein applied both to state and federal courts. *Ex parte Schollenberger*, 96 U. S. 369, and *Reagan* v. *Farmers Loan & Trust Co.*, 154 U. S. 362.

The *Schollenberger* case (96 U. S. 369) was decided prior to the amendment of the Federal Venue Statute at a time when the statute provided that the presence or finding of a corporation within the district where suit was brought was sufficient. The important principle, however, running through the case, and which we respectfully submit was not affected by the change in the venue statute, is that a *foreign corporation may consent to or waive lack of venue*, and such agreement may be made prior to the institution of suit. Jurisdiction in the *Schollenberger* case was based on diversity of citizenship. The fact that jurisdiction in the instant case is grounded on a federal question presents

an unimportant difference. *In re: Keasbey and Mattison*, 160 U. S. 221; *St. Louis & San Francisco Ry. Co.* v. *McBride*, 141 U. S. 127, 131.

The doubt expressed by petitioners in regard to this question we believe has been occasioned by *Southern Pacific Co.* v. *Denton*, 146 U. S. 202, wherein the plaintiff, an inhabitant of the Eastern District of Texas, brought suit in the Federal Court in the Western District against a Kentucky corporation doing business in the latter district, the jurisdiction resting on diversity of citizenship. A statute of Texas required that a foreign corporation seeking to transact a local business therein should agree not to remove cases to the federal courts and, further, that it appoint a service agent. This Court held the entire statute bad, due to the removal provision, which is first discussed. The Court next takes up the venue question, and discusses it just as if the Texas statute were separable. When the strict limits of the agreement in the *Denton* case are kept in mind, it in no wise conflicts with anything said in the *Schollenberger* case, which is cited therein. In commenting on the agreement the Court said (p. 207):

> "Moreover, the supposed agreement of the corporation went no further than to stipulate that process might be served on any officer or agent engaged in its business within the State. It did not undertake to declare the corporation to be a citizen of the State, nor * * * to alter the jurisdiction of any court as defined by law."

It will be observed that the agreement dealt with service of process only, and did not affect venue. It fell short of

the agreement approved by the *Schollenberger* case, wherein, at page 370, it was said:

> "* * * If the citizenship of the parties is sufficient, a defendant may consent to be sued anywhere he pleases, and certainly jurisdiction will not be ousted because he has consented."

In the *Denton* case, as we have pointed out, there was an agreement for the appointment of an agent for service, but it was not broad enough to constitute a waiver of venue. It is also important to note in considering the *Denton* case that if the Court did not have in mind the distinction we are endeavoring to draw, a discussion of the venue question and the effect of the particular agreement would have been unnecessary, since the Court had disposed of the removal question, by holding the consent void as requiring,

> "as a condition precedent to obtaining a permit to do business within the state, to surrender the right and privilege secured to it by the Constitution and laws of the United States was unconstitutional and void and could give no validity or effect to any agreement or action of the corporation in obedience to its provisions. *Insurance Co.* v. *Morse*, 20 Wall. 445; *Barron* v. *Burnside*, 121 U. S. 186; *Texas Land Co.* v. *Worsham*, 76 Tex. 556."

It is fair to assume, therefore, were petitioners' position herein correct, that the court would have disposed of it in the same manner as that of removal, instead of pointing out that the appointment of a service agent alone was not sufficient to constitute a waiver of or consent to venue.

The latter portion of the opinion deals with the Texas Practice Act, which made a special appearance, "a waiver of immunity from the jurisdiction by reason of nonresidence." The Court held that the Conformity Act did not require the adoption of a state practice act, which would compel a defendant to waive venue.

Later, in *In re: Hohorst*, 150 U. S. 653, this Court again indicated the narrow limits of the agreement in the *Denton* case:

> "It is contended in behalf of the company that this case was governed by the recent decisions of this court in *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444, and *Southern Pacific Co.* v. *Denton*, 146 U. S. 202, but those decisions went no further than to hold that within the meaning of the judiciary acts a corporation cannot be considered as a citizen, an inhabitant or a resident of the state in which it has not been incorporated; and that under the Act of 1888 a corporation incorporated in one of the United States and in that state only cannot be compelled to answer in another state in which it has a usual place of business and of which the plaintiff is not a citizen."

It is apparent from the foregoing that the holdings in the *Shaw* and *Denton* cases are considered the same. In the *Shaw* case there was no agreement, and in the *Denton* case there was likewise no agreement insofar as venue is concerned. Mr. Justice GRAY wrote the opinions in the *Shaw*, *Denton* and *Hohorst* cases. Mr. Justice GRAY also wrote the opinion in *In re: Keasbey & Mattison*, 160 U. S. 221, wherein, at page 229, the following appears:

> "And it is established by the decisions of this court, that within the meaning of this Act a corporation can-

not be considered a citizen, an inhabitant or a resident of the state in which it has not been incorporated; and, consequently, that a corporation incorporated in a state of the Union cannot be *compelled* to answer to a civil suit at law or in equity in a Circuit Court of the United States held in another state, even if the corporation has a usual place of business in such state. *McCormick Co.* v. *Walters*, 134 U. S. 41, 43; *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444; *Southern Pac. Co.* v. *Denton*, 146 U. S. 202.

"Those cases, it is true, were of the class in which the jurisdiction is founded only upon the fact that the parties are citizens or corporations of different states. But the reasoning on which they proceed is equally applicable to the other class mentioned in the same section, of suits arising under the Constitution, laws or treaties of the United States; and the only difference is that by the very terms of the statute a suit of this class is to be brought in the district in which the defendant is an inhabitant, and *cannot, without the consent* of the defendant, be brought in any other district, even in one in which the plaintiff is an inhabitant." (Italics ours.)

By the use of the word *"compelled"* in one paragraph of the foregoing quotation and the words *"without the consent of the defendant"* in the next paragraph, the distinction is clearly brought out and shows the sense in which the Court used the word "compelled" in the *Shaw*, *Denton* and *Hohorst* cases, and that it was understood to apply only to instances where there was no consent to or waiver of venue.

Wherefore, respondents respectfully pray that the judgment of the Circuit Court of Appeals herein be in all things affirmed.

Respectfully submitted,

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